

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

ATTY.'S DOCKET: SADAKIYO1

In re Application of:	)	Office of the Deputy
	)	Commissioner for Patent
SADAKIYO et al.	)	Examination Policy
	)	
Patent No.: 7,534,458	)	Washington, D.C.
	)	
Patent Date: May 19, 2009	)	Confirmation No. 5989
	)	
For: PROCESS FOR PRODUCING...	)	July 20, 2009

REQUEST FOR RECONSIDERATION OF PATENT TERM ADJUSTMENT

Honorable Commissioner for Patents  
U.S. Patent and Trademark Office  
Customer Service Window  
Randolph Building, Mail Stop Petitions  
401 Dulany Street  
Alexandria, VA 22314

Sir:

Pursuant to 37 CFR 1.705(d), reconsideration of the patent term adjustment indicated on the face of the above-identified patent is hereby requested.

In accordance with 37 CFR 1.705(b)(1), submitted herewith is the fee of \$200 as set forth in 37 CFR 1.18(e). If there is any underpayment or any other fee necessary for consideration of this request, please charge same to the deposit account no. 02-4035 of the undersigned.

The following statement of the facts involved is in compliance with 37 CFR 1.705(b)(2). The correct patent term adjustment is 1036 days. The period of delay under 37 CFR

1.702(a) is 710 days, as properly calculated by the PTO. However, the PTO failed to take into account the non-overlapping period of delay under 37 CFR 1.702(b). The period of time from May 18, 2008 (three years after the Filing or 371(c) date) to issuance of the patent on May 19, 2009, was 366 days.

37 CFR 1.703(f) provides that the periods of delay under 1.702 are added together "to the extent that such periods are not overlapping." In *Wyeth v. Dudas*, 2008 U.S. Dist. LEXIS 76063, 88 USPQ2d 1538 (D.D.C. Sept. 30, 2008), the U.S. District Court for the District of Columbia held that only periods of actual calendar days overlap between the time periods of delay calculated under 1.702(a) and 1.702(b) are to be considered as overlap within the meaning of 1.703(f). Thus, in this case, the only days of "overlap" are the 40 days of delay under 1.702(a) that occurred after May 18, 2008, which was the commencement of the 1.702(b) delay. The 670 days of 1.702(a) delay that occurred prior to the commencement of the 1.702(b) delay must be added to the 366 days of delay under 37 CFR 1.702(b) to determine the total PTO delay, as per the interpretation required by the *Wyeth* court.

Thus, the period of patent term adjustment by the interpretation approved by the court in *Wyeth v. Dudas, supra*, is  $710+366-40= 1036$  days, minus any period attributed to applicant's delay (37 CFR 1.704). The PTO calculated

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applicant's delay as 0 days. Thus, using the PTO's figures and the court's interpretation, the correct period for patent term adjustment should have been 1036 days, i.e.,  $1036-0=1036$  days. No terminal disclaimer has been filed in this case.

These issues could not have been raised on or before the date of payment of the issue fee as the period of adjustment under 1.702(b) did not become determined until the patent issued. Indeed, the PTO does not consider the effect of the 1.702(b) period until it mails the issue notification. Accordingly, this request for reconsideration of the patent term adjustment is timely under 37 CFR 1.705(d).

Granting of this request and modifying the patent term adjustment afforded this case to a total of [Insert {1} from above] days are therefore earnestly solicited.

Respectfully submitted,

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